There's more to title insurance than meets the eye

On the surface, the title insurance business looks to be a roaring success: In 2009, title insurance premiums in Ontario alone were more than $130 million. Over the last 10 years, the revenue of major Ontario title insurers has increased more than 500 per cent.

But one does not need to scratch too far below the surface to discover that for the bar, this business has come with – and continues to have – its fair share of challenges.

Lawyers continue to express surprise at the fact that title insurance does not take the risk out of real estate practice. In this editorial and on the following pages, we examine why real estate lawyers continue to report claims in numbers we have not seen for many years – and why the use of title insurance has not necessarily taken the pressure off the errors and omissions (E&O) program.

As we discuss on the following pages, many lawyers using title insurance still don't understand the product they're using and how it works – even though an estimated 95 per cent of residential purchase transactions in Ontario are now title-insured and a lawyer "not at that time in the employ of the title insurer" must issue a certificate of title for each policy, under O.Reg. 69/07. Several articles examine this conundrum – and provide insights into what is and is not covered.

Our goal with this special focus on real estate and title insurance: To share information that will help the practising bar make better choices and decisions – and ultimately help keep real estate negligence claims in check and real estate lawyers in the game.

Title insurance and the E&O program

Has the advent of title insurance in Ontario helped take the financial pressure off of the errors and omissions (E&O) program?

It may be tempting for some to point to all the claims paid by title insurers and say that they represent savings to the E&O program to the tune of 100 cents on the dollar. For example, in 2009 title insurers in the aggregate (including LawPRO) reported to the regulators more than $50 million in title insurance claims costs in Ontario. But those claims would not necessarily all have been covered under an E&O policy for lawyers' negligence; they could, for example, arise out of risks such as post-policy date coverages and lawyer fraud where there are no innocent partners to pursue, or

from title insurer acceptance of risk where a search was waived by the title insurer.

We have to assume that in a non-title insurance world, lawyers would have continued to make title and off-title searches consistent with the legal standard of practice, and the latter category of claims (waiver of searches) would not have arisen, or would have been much smaller. In terms of risk areas that would **not** have been covered under a lawyer's E&O insurance, this is a benefit for the insured clients, but not necessarily a big cost savings to the E&O program.

As mentioned above, title insurance premiums in Ontario for 2009 were in excess of $130 million. So, on a simplistic analysis, about 40 cents of each per premium dollar is going towards claims, based on regulatory filings. With a claims ratio for the industry as a whole in the neighbourhood of 40 per cent, it is not surprising that title insurers feel able to offer protection that one doesn't necessarily obtain from a lawyer's opinion on title. And that extra protection is all good for clients!

The "lawyer-as-advisor" model

Protection for consumer clients is at the heart of the lawyer-focused model of title insurance that we have come to take for granted. But keeping intact this model (which pivots around consumer protection issues and the value that a lawyer adds to the transaction) has been and continues to be a struggle.

Back in the mid-1990s, the real estate bar successfully held at bay what it saw as efforts to start us down the road towards a U.S. conveyancing model – in which a real estate closing handled by a title agent, backed by title insurance, is often an alternative to using a lawyer.

What galvanized the Ontario bar to repudiate the U.S. non-lawyer model back then was the conviction that lawyers play an important role in protecting the consumer interest in conveyancing. Homebuyers go to their lawyers to help them avoid or solve problems: They look to their lawyer to take care of the "legal stuff" and prevent problems down the line. Title insurance, then, is but one tool in the lawyer's conveyancing toolbox. And to ensure it is used appropriately, the Law Society in the late 1990s revamped its *Rules of Professional Conduct* to reflect this fundamental change in the Ontario real estate landscape.

In the intervening years, this model of the lawyer as the quarter-back of a real estate purchase transaction has carried on notwithstanding closing centre pilot projects, the insourcing of mortgage-only document preparation by some title insurers, and certain lenders outsourcing mortgage work to third-party processors (or intermediaries) on purchase transactions. The concern raised by these process models: whether access to independent legal advice for clients is necessarily as embedded; and thus whether the lawyer's role as independent legal advisor and source of value-added information is being undermined.

But for the real estate bar to continue to be a pivot point in conveyancing, lawyers need to seriously take on the mandate of being their clients' valuable and trusted advisor: To be embedded for the long term, lawyers must continue their vigilance and oversight. You need to be adding value, and demonstrating to your clients how you add value.

Another ongoing concern is the recent use of contests among title insurers: When aimed at law clerks working in law firms, these programs appear to solicit policy orders in return for the chance of some type of reward. Who is running the show at a firm where the central protection for the client in the deal (that is, a title insurance policy instead of an opinion on title) can be influenced by the availability of a contest entry for a staff member?

These types of programs raise issues: Although LawPRO has no jurisdiction or interpretive power over the *Rules of Professional Conduct*, one wonders how such contests jive with the commentary to Rule 2.02(12) which states that the fiduciary relationship between lawyer and client prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm and any employee or associate of the firm. Of course, it is unlikely that any client knows to complain, or has even connected the dots to figure out who ultimately bears the cost of such contests.

Needless to say, LawPRO and our TitlePLUS program will not play the game of rewards (or the chance of rewards) for policy orders. We have recently voiced our concerns and questions about this type of activity on the part of other title insurers with the appropriate insurance regulatory body. Even if our technical analysis were proven to be incorrect, we cannot see how this approach to distributing insurance helps your clients, the prospective insureds under the title insurance policy.

If these activities are left unchecked and unchallenged, we could in Ontario find ourselves in a similar situation to that found in various states south of the border: In the past some title insurance sales and marketing programs existed which resulted in certain title insurers paying millions in response to allegations of market misconduct (civil and/or regulatory), often (if not always) settled without a finding of contravention or liability. It behooves us, as members of the bar, to put our own integrity at the forefront and to avoid a title insurance world where detailed rules are needed to regulate marketing and distribution.

After all, isn't it a pretty simple rule when the client's best interests must be paramount?

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